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Supreme Court, U.S.
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No. 03-1601

IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et. al.*,

Petitioners,

v.

MARK J. ABRAMS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL ASSOCIATION OF COUNTIES, AND THE UNITED STATES CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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The National League of Cities, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the National Association of Counties, and the United States Conference of Mayors submit this brief as amici curiae supporting Petitioners, the City of Rancho Palos Verdes, California and its City Council.[1]

INTEREST OF AMICI CURIAE

The National League of Cities ("NLC") represents more than 18,000 communities and is the oldest and largest national organization representing municipal governments. Founded in 1924, NLC strengthens local government through research, information sharing, and advocacy on behalf of hometown America.

Since 1935, the International Municipal Lawyers Association ("IMLA") has been the primary advocate for the chief legal officers of local governments throughout the United States and Canada. Since its establishment, IMLA has advocated for the rights and privileges of local governments and the attorneys who represent them. IMLA serves its membership by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as an amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

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[1] Pursuant to this Court's Rule 37.2, letters of consent from both parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amici represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The National Association of Telecommunications Officers and Advisors ("NATOA") has represented the telecommunications needs and interests of local governments for over twenty years. NATOA serves as a professional association advising individuals and organizations responsible for telecommunications policies and services in local governments throughout the country.

Created in 1935, the National Association of Counties ("NACo") ensures that the Nation's 3,034 counties are heard and understood at all levels of the federal government. NACo's membership totals more than 2,000 counties, representing over 80 percent of the nation's population.

The United States Conference of Mayors ("USCM"), in existence since 1932, is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,183 such cities in the country today, each represented by its chief elected official, the mayor.

The amici have a strong interest in this case. The Ninth Circuit's decision places a substantial financial burden on local governments. As this Court has observed, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "1996 Act") is "not a model of clarity." *AT & T v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). As a result, local governments – including many smaller governments with limited resources – may attempt in good faith to follow the requirements of the 1996 Act and yet still run afoul of its demands. Under the Ninth Circuit's decision in this case, these governments will be required to pay prevailing plaintiffs damages under 42 U.S.C. § 1983 and attorneys' fees under 42 U.S.C. § 1988. Because such awards are often substantial, local governments operating with limited resources may conclude that they cannot afford to exercise control over the placement and construction of wireless facilities, despite Congress's determination that local governments

should retain authority "over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A).

The effects of the decision in this case are likely to be felt well beyond the borders of the Ninth Circuit. Although the Third and Seventh Circuits have found §§ 1983 and 1988 to be unavailable in suits brought under § 332(c)(7)(B), *see Primeco Personal Communications, Limited Partnership v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003); *Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687 (3rd Cir. 2002), local governments in other circuits will be leery about exercising their congressionally-protected authority to make decisions regarding the placement of wireless facilities. Many local governments outside the Ninth Circuit may provide less protection to community interests in safety and aesthetics in order to avoid the risk of having to pay out hundreds of thousands of dollars in damages and attorneys' fees.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The City's Petition for Certiorari presents an important issue of law that merits this Court's review. The question presented involves the proper application of two important federal statutes. The law is now in a state of confusion as a result of the contradictory opinions of the Third, Seventh, and Ninth Circuits. The Ninth Circuit's decision is incorrect because it ignores both the congressional preservation of authority over the placement of wireless facilities and the comprehensive remedial scheme for redressing violations. If allowed to stand, the decision will have a substantial detrimental affect on local decision-making, contrary to the intent of Congress.

Congress enacted the 1996 Act to create a "policy framework designed to accelerate rapidly private sector

deployment of advanced communications." H.R. Conf. Rep. No. 104-458, at 113, *reprinted* in 1996 U.S.C.C.A.N. 124. At the same time, Congress recognized the need to preserve state and local zoning authority over the siting of wireless telecommunications facilities. Congress recognized that at the most basic level any decision regarding the siting of wireless telecommunications facilities is a land use decision and enacted legislation accordingly.

Specifically, Congress enacted § 332(c)(7) which is titled "Preservation of local zoning authority." This section states in part:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

47 U.S.C. § 332(c)(7)(A). Congress limited this authority by providing that local governments may not discriminate unreasonably between providers of services, and may not prohibit the provision of personal wireless services. 47 U.S.C. § 332(c)(7)(B)(i). In addition, local governments are required to act on requests in a reasonable period of time, to document denials in writing, and support them with substantial evidence in the record. 47 U.S.C. § 332(c)(7)(B)(ii) and (iii).

Congress further provided that

> [a]ny person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

47 U.S.C. § 332(c)(7)(B)(v).

By enacting § 332(c)(7), Congress reiterated and protected local government's long-standing zoning authority, while imposing affirmative obligations on local government to ensure telecommunications deployment. Congress also provided a specific and unique mechanism through which persons alleging a violation of these provisions of the 1996 Act could seek redress in a federal or state court. Congress recognized that decisions regarding the placement, construction, and modification of wireless facilities are made in the context of land use decisions. Congress was also aware of the ordinary manner in which land use decisions are litigated and provided for a different method of litigation, a method which is contrary to the body of law developed under § 1983.

ARGUMENT

I. THE CONFLICT IN THE CIRCUITS REQUIRES RESOLUTION BY THIS COURT

The Ninth Circuit's decision in this case conflicts with decisions of the Third and Seventh Circuits. *See Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687 (3rd Cir. 2002); *Primeco Personal Communications, Limited Partnership v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003). (A panel of the Eleventh Circuit followed reasoning similar to the Ninth Circuit, but its decision was vacated and the case was dismissed. *See AT&T Wireless PCS, Inc., v. City of Atlanta*, 210 F.3d 1322 (11th

Cir. 2000), *vacated on reh'g en banc*, 260 F.3d 1320, *dismissed on settlement*, 264 F.3d 1314 (2001)). As a result of these decisions, local governments in some states are protected from claims for § 1983 damages and attorneys' fees for violations of the 1996 Act, while in other states local governments are exposed to such claims. The conflicting decisions of the courts of appeals have created considerable uncertainty throughout the rest of the country.[2]

The Third Circuit held that § 1983 is not available to enforce rights under the 1996 Act because that Act "provides private judicial remedies that incorporate notable benefits and corresponding limitations." *Nextel*, 286 F.3d at 694. The Third Circuit concluded that superimposing §§ 1983 and 1988 on top of this scheme would upset the balance established by Congress in the 1996 Act. *Nextel*, 286 F.3d at 694.

Similarly, the Seventh Circuit held § 1983 remedies are not available to enforce the Telecommunications Act. *Primeco*, 352 F.3d at 1152. The Seventh Circuit noted that the purpose of § 1988 is to shore up the ability of those with meager resources to vindicate their rights. Judge Posner's opinion for the court concluded that the 1996 Act benefits telecommunications enterprises, "substantial corporations" which "have the wherewithal to finance their own litigation." *Id.* at 1152. Although the Seventh Circuit viewed the 1996 Act as silent on the issue of remedies (and thus distinguishable from the remedial scheme described in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 20 (1981)), the court reasoned that the 1996 Act confers the right to sue and this right "is presumed to entitle a successful plaintiff to the usual remedies." Therefore, the court held, § 1983 should not be "fastened, barnacle-like" to the 1996 Act. *Primeco*, 352 F.3d at 1152-53.

The Ninth Circuit rejected the Third Circuit's conclusion that the 1996 Act embodies any remedial scheme, let alone a comprehensive scheme. Pet. App. 7a-8a. There is thus a direct conflict in the circuits that can be resolved only by a decision of this Court. The issue has now been thoroughly analyzed in decisions of multiple courts of appeals. The unequal treatment of local governments (and plaintiffs) in different circuits, as well as the substantial uncertainty generated by the conflicting decisions of the lower federal courts, weigh in favor of prompt review by this Court.

II. THE NINTH CIRCUIT'S DECISION IS INCORRECT

Under this Court's precedent, the Ninth Circuit's decision cannot stand. It is undisputed that the 1996 Act: (i) provides plaintiffs with a right to file suit within 30 days of an alleged violation in any court, 47 U.S.C. § 332(c)(7)(B)(v); (ii) further provides that decisions of local governments will be reviewed under a "substantial evidence" standard, 47 U.S.C. § 332(c)(7)(B)(ii); and (iii) requires a prompt judicial decision, 47 U.S.C. § 332(c)(7)(B)(iii). These specific requirements, coupled with the presumption that a right to sue carries with it the appropriate remedies, are "sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. at 20.

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[2] As the City's petition explains (Pet. 26), local governments that deny applications to erect antenna towers frequently find that they become defendants in actions brought by the disappointed applicant in federal court under § 332(c)(7) of the 1996 Act. Federal district courts have also divided on the availability of § 1983 damages and § 1988 fees in such cases, adding to the confusion in this area. *See* Pet. 19-20.

The provision of a specific federal review mechanism under § 332 counsels against the availability of § 1983 as an additional means to vindicate violations of the 1996 Act. In *Gonzaga University v. Doe,* 536 U.S. 273 (2002), this Court found that the Family Educational Rights and Privacy Act (FERPA) did not create any private rights enforceable through § 1983. In reaching that conclusion, this Court distinguished prior cases in which it had upheld the availability of redress under § 1983, noting that in those cases aggrieved parties "lacked any federal review mechanism." *Id.* at 290, citing *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), and *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990).

Here, Congress expressly created a mechanism for obtaining federal judicial review of zoning decisions regarding wireless facilities, including expedited judicial review of such decisions. 47 U.S.C. § 332(c)(7)(B)(v). Not only is this a comprehensive remedy, but it is significantly different from the usual manner of challenging land use decisions under § 1983. In the normal course of § 1983 land use litigation, plaintiffs are not required to file suit within 30 days and are not entitled to expedited resolution of their cases. Indeed, apart from § 332(c), land use disputes with local governments typically must be litigated in state court in the first instance. *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999) ("A federal court, moreover, cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy."); *Polenz v. Parrott*, 883 F.2d 551, 558-59 (7th Cir. 1989) (to succeed on substantive due process claims, plaintiff must show inadequacy of state law remedies).

The legislative history confirms that Congress intended to preserve the authority of State and local governments over zoning and land use matters except in

limited circumstances, and to prevent the Federal Communications Commission from preempting local and State land use decisions. *See* H.R. Conf. Rep. No. 104-458, at 207-8 (1996). The Conference Report notes that challenges under § 332(c)(7) are not subject to the restrictions imposed by long-standing § 1983 land use law such as exhaustion of state law remedies and the concurrent inability to proceed in federal court. The text of the Conference Report could not be more specific:

> The conferees intend that the court to which a party appeals a decision under section 332(c)(7)(B)(v) *may be the Federal district court* in which the facilities are located or a State court of competent jurisdiction, at the option of the party making the appeal, and that the courts act expeditiously in deciding such cases. The term "final action" of that new subparagraph means final administrative action at the State or local government level so that *a party can commence action under the subparagraph rather than waiting for the exhaustion of any independent State court remedy otherwise required.*

H.R. Conf. Rep. No. 104-458, at 209 (1996) (emphasis added). Thus, § 332(c)(7) not only provides a comprehensive remedial scheme, it also departs from the current state of the law in the application of § 1983 in land use cases by allowing immediate and expedited review in federal court.

The language Congress employed coupled with the legislative history show that Congress did not intend plaintiffs seeking redress of alleged § 332(c)(7) violations to have to resort to the normal avenues of relief available in land use cases. Congress was well aware of the normal mechanisms for litigating land use disputes under § 1983

and altered this litigation landscape when it enacted § 332(c)(7). This is supported by the numerous bills that were pending in Congress at the time the 1996 Act was drafted and enacted that sought to change the manner in which land use disputes are litigated. *See, e.g., The Private Property Protection Act*, H.R. 925; *Omnibus Property Rights Act of 1995*, S.B. 605; 104th Cong., 1st Sess. (1995). For most of the latter portion of the 1990s Congress had before it one or more bills which sought to accomplish for all of land use law what it had accomplished for § 332(c)(7) of the Telecommunications Act. *See, e.g., Private Property Rights Act of 1997* S.B. 709; *Citizens Access to Justice Act of 1997*, S.B. 1256; *Property Owner's Access to Justice Act*, S.B. 1204; *Private Property Rights Implementation Act of 1997*, S.B. 1534, 105th Cong. (1997).

The stated purposes of these bills were to simplify and expedite access to federal courts for those alleging interference with their property rights, to clarify when government action was sufficiently final to "ripen" claims under the Constitution, and to eliminate exhaustion requirements. *See* Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 Stan. Envtl L.J. 3, 27-35 (2004). Ultimately, none of these bills was successful because of grave concerns about whether Congress had the authority to effect such a change in the constitutional requirements for litigating land use disputes. The legislative history of § 332(c)(7) shows that Congress fully intended to implement this change in litigation confined to the siting of wireless facilities.

III. THE NINTH CIRCUIT'S DECISION WILL HAVE A SIGNIFICANT ADVERSE EFFECT ON LOCAL GOVERNMENT ENFORCEMENT OF ZONING LAWS

The 1996 Act and judicial decisions interpreting the 1996 Act affect local governments throughout the United States. The 1996 Act makes tower siting disputes subject to a litany of federal requirements that readily lend themselves to litigation, including requirements that the local government may not "unreasonably discriminate" among service providers, may not "prohibit or have the effect of prohibiting the provision of personal wireless services," must issue decisions within "a reasonable period of time" and based on "substantial evidence," and may not consider "the environmental effects of radio frequency omissions." *See* Pet. 27 (internal quotations and citations omitted).

The United States is comprised of 3,034 counties, 19,431 municipalities and 16,506 townships. See THE MUNICIPAL YEAR BOOK 2004, International City/County Management Association xi (2004) (citing U.S. Census data for 2002). Thus, nearly 40,000 local governments are potentially affected by the application of §§ 1983 and 1988 to suits arising under the 1996 Act. The vast majority of these jurisdictions have less than 50,000 inhabitants. *Id.* at xii-xiii. Many do not have full-time counsel. These jurisdictions face a serious, and potentially disastrous, financial burden if they are required to pay damages and attorneys' fees for inadvertent violations of a specialized federal statute.

A recent survey of attorneys' fee calculations in 16 federal civil rights cases in California covering the years 2000 and 2001 found that federal courts awarded attorneys' fees with an average billable rate of $253.44, and an average amount awarded of over $150,000. Michael Koa, *Calculating Lawyers Fees: Theory and*

Reality, 51 U.C.L.A. L. Rev. 825, 841 (2004). The author also reviewed thirteen California state court civil rights cases awarding attorneys' fees, finding an average billable rate of $234.33 per hour, and an average award of more than $65,000. *Id.* at 841. These amounts are "substantially above the fee caps in cases against the federal government under the Equal Access to Justice Act (maximum hourly rate of $125), and also well above the amount awarded to appointed counsel in federal criminal cases (maximum hourly rate of $75)." *Id.* at 845.

Attorneys' fees in civil rights cases often exceed the actual monetary damages awarded to plaintiffs. *See Fair Housing of Marin v. Combs*, 285 F.3d 899, 907-08 (9th Cir. 2002) (affirming an award "more than five times the amount of the compensatory and punitive damage awards combined"); *Cowan v. Prudential Ins. Co.*, 935 F.2d 522, 526 (2d Cir. 1991) (lodestar "should not be reduced simply because a plaintiff recovered a low damage award"). The flexible "reasonableness" standard of § 1988 permits a court to award legal fees that substantially exceed the damages. Indeed, this Court upheld an attorney's fee award of $245,456 in a case where the plaintiff only recovered $33,350 in compensatory and punitive damages. *City of Riverside v. Rivera*, 477 U.S. 561, 564-65 (1986). The size of these awards can create havoc with local government budgets.

To place attorney fee awards in context, in 2002, police and sheriff's patrol officers had median annual earnings of $42,270, while median hourly earnings of firefighters were $17.42 in 2002 (assuming a 40 hour work week, this amounts to a yearly salary of approximately $36,000). *See Occupational Outlook Handbook*, Bureau of Labor Statistics, Department of Labor, available at http://stats.bls.gov/oco/ocos160.htm and http://stats.bls.gov/oco/ocos158.htm.

Fear of these awards would certainly lead to a chilling effect with respect to wireless siting issues. More than three police officer, or four firefighter, positions could be eliminated as a result of an attorney fee award of $150,000. These chilling effects are widely recognized. In a 2002 article in the Pittsburgh Tribune-Review constitutional law Professor Arthur Hellman stated that, because of the threat of attorney's fees, "[t]here will still be strong incentives (for defendants) to settle cases," and "[o]fficials are going to think twice" about pursuing cases to trial. *See* Joseph D. Wilcox, *Legal Fees Can Add Up In Civil Rights Cases*, Pittsburgh Tribune-Review, Dec. 2, 2002, available at http://www.pittsburghlive.com/x/search/s_105525.html.

The chilling effect on local government zoning authority as a consequence of applying § 1983 for violations of the 1996 Act is significant. The Ninth Circuit's decision subjects local governments to the threat of substantial monetary liability if they deny applications to erect cellular antenna towers. Because disappointed applicants can file suit in federal court with relative ease, the Ninth Circuit's decision will require local governments to adjust their planning and zoning efforts in order to conserve their limited financial resources. Many local governments will decide that visual, aesthetic and safety concerns are "not worth fighting for" in light of the possibility of having to pay their opponents' legal fees. The Ninth Circuit's decision thus undermines the intent of Congress to leave authority for local zoning decisions in the hands of local governments, and compromises the ability of local governments to protect their citizens.

The Third and Seventh Circuits recognized that allowing well-funded and sophisticated telecommunications providers to recover their litigation costs from local communities subverts the purpose of §§ 1983 and 1988. *See Primeco*, 352 F.3d at 1152; *Nextel*, 286 F.3d at 695. Many local governments are small and

unsophisticated, with minimal financial resources. The attorneys' fees awarded under §§ 1983 and 1988 would come from revenues which these local governments should be spending on basic services including police and fire protection, infrastructure, and general services. Congress did not intend to provide wireless service providers with the ability to seek attorneys' fees any time a local government improperly denies a permit to construct wireless facilities.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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